IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

CROWN CAN COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. .....

BRIEF OF PETITIONER.

A concise statement of the facts and issues is set forth in the petition for writ of certiorari, to which the Court is respectfully referred in order that we may avoid needless repetition.

In the instant case, the decline in membership in the proposed union was not due to the refusal of the employer or Company to bargain with the union as representative of the employees in the manner contemplated by the National Labor Relations Act, but such decline was due to the fact as shown by all of the witnesses of the Company in the present case who stated that they could not derive any benefit from the union. Such witnesses further stated that as a result thereof they did not desire to have any connection with the union nor did they want to have the union represent them in any way. In spite of this an order was entered by the National Labor Relations Board to the contrary, and which order was approved by the United States Circuit Court of Appeals for the Eighth Circuit in

the petition for enforcement, which said order and decision deprives the employees of the Company from any rights guaranteed them under the constitution to even think or express thoughts as to their desires concerning union organization and representation.

Petitioner herein contends that the United States Circuit Court of Appeals for the Eighth Circuit has erred in granting the petition for enforcement found by the National Labor Relations Board, in that there is no substantial evidence in the record to support the conclusions which the Board arrived at. In support of such contention, the Company desires to call this Court's attention to the case of Bussman Mfg. Co. v. National Labor Relations Board, 111 Fed. (2d) 783, l. c. 787, wherein the Court said:

> "When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact-finding tribunal cannot guess between the two causes and find that union activities was the real cause when there is no satisfactory foundation in the testimony to support the conclusion. Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361. When evidence is consistent with either of two inconsistent hypotheses it establishes neither. Stevens v. The White City, 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; New York C. R. Co. v. Ambrose, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562. Under these circumstances, had the case been tried by a jury, it would have been the duty of the trial judge to direct a verdict for the defendant Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; Massachusetts Protective Ass'n v. Mouber, 8 Cir., 110 F. (2nd) 203, 206. Proof of mere sequence is not sufficient to establish consequence or causal sequence. A post hoc ergo propter hoc is sound neither in logic nor in law. Had there been evidence that the employer sometimes or often had discharged employees for union activities, or had there been other substan-

tial evidence to show that it was highly probable that the discharge was the result of union activities, the Board's conclusion could be sustained. Wigmore, Principles of Judicial Proof, p. 20, Sec. 4 (a). But no such probative circumstances are in evidence."

"In relation to what is substantial evidence, we call the Court's attention to an opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the case of Wilson & Co., Inc., v. National Labor Relations Board, 126 Fed. (2d) 114, l. c. 116:

> 'We have conceived it to be our duty to study the evidence in these labor cases for the purpose of ascertaining the existence or absence of substantial proof to support the findings of the Board. In making this study, we have sifted the evidence and endeavored to analyze it as we do in the ordinary civil suits, for the sole purpose of ascertaining the existence of substantial evidence to support the Board's findings.
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> 'We have recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce. We must confess that at times we have apparently failed to recognize that evidence which would not appeal to any normal, rational appraiser of the truth, may yet fall within the field of "some evidence." On the assumption that such evidence would not be sufficient to sustain a finding in an ordinary civil suit, we have rejected it. We have at times set aside the findings of the Board, but only for the same reason that we have set aside findings of fact by the trial court and by special masters, or referees in bankruptcy, to wit, when the findings were so overwhelmingly opposed by the evidence as to require it.'

"In view of such ruling of the courts the Company is fully convinced that there is no substantial evi-

dence in this case to support the findings and order of the National Labor Relations Board. The provisions of Section 10 (e) of the National Labor Relations Act that the findings of the Board as to facts, if supported by evidence, shall be conclusive, means that there must be evidence supporting a substantial basis of fact from which the fact in issue can be reasonably inferred, which must be more than a scintilla and must do more than create a suspicion of the existence of the fact to be established, and must be such relevant evidence as a reasonable man might accept as adequate to support the conclusion and enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

"The United States Supreme Court, in the case of National Labor Relations Board v. Columbian Enameling and Stamping Co., Inc., 306 U. S. 292, 83 L. Ed. 660, held:

> 'But, as has often been pointed out, this (facts supported by evidence), as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Citing Washington V. & M. Coach Co. v. N. L. R. B., 301 U. S. 142, 81 L. ed. 965; Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. ed. 126; Appalachian Elec. Power Co. v. N. L. R. B., 93 Fed. (2d) 985, 989; National Labor Relations Board v. Thompson Products, 97 Fed. (2d) 13; Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 Fed. (2d) 758, 764.'

"In the Appalachian Elec. Power Co. case, supra, it was held that:

> 'What is substantial evidence in such case is not difficult to define in general terms. It is such evidence as in the mind of a reasonable man would support the conclusion of the Board. No mere

rule of thumb, however, will suffice to solve the difficulty in most cases. It will not do, as counsel for the Board suggests, to show in every case that union membership must be deemed the cause of the discharge if a Board is of the opinion that the employee would not have been discharged for the cause assigned if he had not been a union member. If a good cause for dismissal exists and if it appears that the employee was discharged in good faith for that reason, it is idle to speculate what might have been the employer's attitude if the employee had not been a member of the union.'

* * * * * * *

'Our function is limited to showing whether the conclusion reached is supported by any substantial evidence in the record.' ''

Crown Can Company, petitioner herein, feels that there is no evidence in this case—not even a scintilla of evidence—that the labor union or its representative represented a majority of employees of the Company in an appropriate bargaining unit, nor was there any information supplied the Company as to what might be an appropriate bargaining unit. In the case of National Labor Relations Board v. Dahlstrom Metallic Door Co., 112 Fed. (2d) 756, it was held that an employer is under duty to bargain as soon as the union representative presents convincing evidence of a majority support, and cites the case of National Labor Relations Board v. Remington Rand, 94 Fed. (2d) 862, 868, certiorari denied 304 U. S. 576, 82 L. Ed. 154. In the last mentioned case the Court stated as follows:

"We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by a claimant cannot in good faith be ignored. The union offered to submit signed membership cards, but its offer was not accepted."

Applying this rule in the above case to the facts in the case at bar, we call the Court's attention to the fact that the union representative in the present case never presented any convincing evidence; in fact, presented no evidence whatsoever, and the union representative who testified at the hearing stated that he never called on the representative of the Crown Can Company at Nebraska City, Nebraska, for the purposes of bargaining. Such union representative further testified that he did not know either one of the superintendents in charge of the plant since it started its operations in the summer of 1940. In view of this testimony and applying the rule laid down in the Dahlstrom case (supra) and the Remington Rand case (supra), it is difficult for this petitioner to understand how the National Labor Relations Board can ignore its own witness' testimony and arrive at conclusions which are not supported by any evidence in the record.

As to the question of refusal to bargain, the United States Circuit Court of Appeals for the Eighth Circuit in its opinion admitted "that an employer may request reasonable proof that the union represents a majority of the employees and in the absence of such proof he need not bargain if he in good faith doubts the union's majority." Such language was predicated upon the decision of the United States Circuit Court of Appeals for the Eighth Circuit in an earlier case of National Labor Relations Board v. William Tehel Bottling Co., 129 Fed. (2d) 250, which case upheld the earlier case of National Labor Relations Board v. Somerset Shoe Co., 111 Fed. (2d) 681. The United States Circuit Court of Appeals in the present case said that because the superintendent of the plant of petitioner failed to answer the letter sent by the union representative to him the previous rule as set out above did not apply. The decision of the United States Circuit Court of Appeals in the present case means that if a

superintendent of a company does not promptly answer a letter sent to him by a labor organizer, then such company stands convicted of a charge of refusal to bargain. The testimony in the present case further showed that the petitioner in two other areas (Philadelphia, Pennsylvania, and St. Louis, Missouri) had bargained with this same union and had entered into contracts with such organization.

Since the authority or status of a union duly designated or selected as a bargaining agent is created by and owes its existence to the consent of a majority of the employees in an appropriate bargaining unit, it must as a general proposition be terminated by expressed revocation of such authority by a majority of the employees. International Assn. B. S. O. I. W. v. Pauly Jail Building Co., 118 Fed. (2d) 615, 314 U. S. 639, 86 L. Ed. 513.

The contention of the petitioner in the present case is that the United States Circuit Court of Appeals has overlooked the fact that all of the employees of this Company, eight in number, testified at the time of the hearing that they were not desirous of belonging to this union nor were they desirous of having the union represent them as a bargaining agent. This can mean only one thing, and that is that there has been an expressed revocation by such employees of their desire that the union represent them as a bargaining agent. The right secured to all employees by the National Labor Relations Act to form their union included the right to revoke the designation of a national union as their bargaining agent. It is difficult for this petitioner to understand how it could endeavor to negotiate with a bargaining agent if all of its employees have expressed a desire under oath not to have the union bargain for them. In view of such facts, one can arrive at only one conclusion, and that is that the employees have revoked the agency given to the union representative for bargaining purposes.

It has been repeatedly held as a general proposition that if the union at any time ceases to represent the majority of the employees in an appropriate unit, it loses its power to bargain for the unit. National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 84 L. Ed. 799; National Labor Relations Board v. P. Lorillard Co., 117 Fed. (2d) 921, 314 U. S. 512, 86 L. Ed. 380.

Upon the facts disclosed by the record and the authority of the cases hereinabove cited, it is unbelievable that petitioner herein should not have its rights reviewed and proper decision made. We earnestly believe that the matters involved are of such moment to this petitioner and in view of its past record concerning labor negotiations, that this cause should be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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